

ORIGINAL

EX PARTE OR LATE FILED

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

ORIGINAL

TO-QUYEN T. TRUONG
DIRECT DIAL 202-776-2058
ttruong@dialaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

December 22, 2000

RECEIVED

DEC 22 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written Ex Parte Presentation
Federal-State Joint Board on Universal Service
CC Docket No. 96-45, AAD/USB File No. 98-37

Dear Ms. Salas:

On Thursday, December 21, 2000, counsel for Iowa Communications Network (ICN), faxed to Kyle Dixon, legal advisor to Commissioner Michael Powell, a written *ex parte* presentation regarding the above-referenced matter. A copy of the *ex parte* provided to Mr. Dixon is attached.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and two copies of this letter are being submitted to the Secretary's office and a copy has been provided to Mr. Dixon.

Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,



To-Quyen Truong
Counsel for Iowa Communications Network

TTT/rlr

Attachment

cc (w/o att.): Kyle Dixon

No. of Copies rec'd 012
UNACODE

THE COMMON CARRIER STATUS OF THE IOWA COMMUNICATIONS NETWORK

What is the Iowa Communications Network?

- The Iowa legislature established the Iowa Communications Network (“ICN”) in 1989 to provide telecommunications services to rural Iowa. The state created ICN and built the initial elements of the network because LECs did not respond to an RFP. ICN provides a wide range of services, including long distance, distance learning, telemedicine and Internet access.
- Iowa law defines the class of users eligible to use ICN’s services. Distance learning services are available to all entities, public and private, that provide instructional services. Telemedicine services effectively are available to any facility used by a doctor.
- ICN offers its services under standard terms and conditions that do not vary from customer to customer. Customers are free to choose whether or not to use ICN’s services.

What is a Common Carrier?

- Under the Communications Act, carriers may provide service either as private carriage or as common carriage. Common carriage involves holding oneself out to serve the public indiscriminately or being under a legal compulsion to do so; private carriage involves making “individualized decisions, in particular cases, whether and on what terms to deal.”¹
- The D.C. Circuit held in *NARUC I* that an entity “may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted.”² Moreover, “[t]he cases make clear . . . that common carriers need not serve the whole public[.]”³

ICN Meets the Standards for Common Carriage.

- First, although ICN’s services are, as a practical matter, of value only to a limited segment of the telecommunications services marketplace, ICN offers its services to all entities that it is authorized by law to serve.
 - For instance, ICN’s distance learning services are available to all educational institutions in the state, including schools, colleges and universities, private or public, and to home schoolers certified under state educational laws.
 - ICN’s telemedicine services are available to health care institutions across the state, including public and private hospitals, public and private long term care facilities qualifying as a physician’s clinic, and other physician’s clinics.

¹ *Southern Satellite Systems*, 7 FCC Rcd at 3214 (citing *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (“*NARUC I*”).

² *NARUC I*, 525 F.2d at 641.

³ *Id.* at 642 (citing *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1927)).

- Second, ICN offers its services on generally available terms and conditions and does not negotiate individually with any of its customers. All of ICN's customers take their services from an established rate schedule and are free to choose to purchase those services from ICN or from another provider.
- Third, unlike private carriers, which negotiate specific arrangements with a handful of customers, ICN serves hundreds of customers in Iowa. ICN serves more than 500 discrete entities pursuant to separate service agreements and in excess of 1,600 separate locations.

The FCC Proceeding and the D.C. Circuit's Ruling

- On February 18, 1999, the Commission issued a Declaratory Ruling holding that ICN does not provide telecommunications services on a common carrier basis because it serves only a select group of entities.
- On June 27, 2000, the D.C. Circuit held that the Commission had failed to consider whether, under *NARUC I* and *Midwest Video*, ICN is a common carrier because it offers service to all users that it is authorized by law to serve.
- The D.C. Circuit emphasized that, in *NARUC I*, “the court announced a test for common carriage that focused primarily upon whether the carrier holds itself out indiscriminately to serve all to whom it can ‘legally and practically be of use.’ . . . Both *Midwest Video* and *NARUC* can be read as approving the general rule that a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class. That is precisely Iowa’s argument.”
- There are few, if any, risks to a Commission holding that ICN is a common carrier. It is unlikely that any other state will replicate Iowa’s 1989 decision to establish its network now that the schools and libraries program has made it attractive for commercial carriers to serve that market segment.
- Conversely, a holding denying ICN common carrier status could have the significant adverse consequence of allowing entities to avoid common carrier status and Title II obligations by limiting their clientele, *e.g.*, to large businesses.

ICN Is Fully Prepared to Accept All Its Responsibilities as a Common Carrier

- ICN seeks a Commission holding that it is a common carrier so that schools and libraries can receive universal service funding for services they purchase from ICN. ICN has not sought and will not seek reimbursement for the capital costs of constructing its network.
- ICN already makes contributions to the universal service fund, and ICN recognizes that a Commission determination that it is a common carrier eligible for direct universal service funding also will subject ICN to Title II obligations, including Section 254 universal service contributions, Section 251 interconnection obligations, and other state and federal regulatory requirements.